

# Duty to Third Parties: A New Worry for Doctors

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## Abstract

*The Hawaii Supreme Court ruled on June 10, 2002, that physicians might be liable to non-patient third parties if they fail to warn their patients regarding a medication's adverse effect on driving. Conceivably, this liability may also extend to physicians who fail to inform their patients and/or the Department of Motor Vehicles of medical conditions that affect operating a vehicle safely. Physicians must be cognizant of every medication's impact on driving ability, inform their patients of these adverse effects, and should consider asking their patients to stop driving if the risks are substantial.*

Until McKenzie v. Hawaii Permanente Medical Group, Inc., no Hawaii court had ruled on a physician's legal duty to a third party who is injured in an automobile accident. On June 10, 2002, the Hawaii Supreme Court held that a physician may be liable when a person is injured by a patient who was not warned of his or her medication's effects on driving.<sup>1</sup> The ramifications of this decision are enormous; for the first time in Hawaii, a physician may be sued by an injured party whom he or she has never met. In terms of medications and medical conditions that may pose a driving risk for their patients or non-patient third parties, what are the ethical and legal responsibilities of this ruling for physicians?

## The Facts: McKenzie v. Hawaii Permanente Medical Group, Inc.

On August 8, 1997, eleven-year-old Katie McKenzie was walking along Bishop Street with her parents when a car suddenly veered across five lanes of traffic and struck her, eventually crushing her against a cement planter. Katie received multiple traumatic injuries from this accident and to this day suffers from physical, cognitive, and emotional impairments. The driver of the vehicle, Jerry Wilson, claimed the medication that his physician had prescribed caused him to faint, lose control of his automobile, and strike this unfortunate girl. Both Katie's parents and Wilson contended that Wilson's physician at Hawaii Permanente Medical Group, Inc., was negligent in prescribing a drug without warning him of its potential to cause fainting. Wilson began taking the prescribed medication, prazosin (Minipress®), three days prior to the accident.<sup>1</sup> The McKenzies brought a negligence suit against Hawaii Permanente, but for it to proceed, the Hawaii Supreme Court first needed to determine the extent, if any, of a physician's duty to third parties, without which Katie McKenzie's claim would fail.

## The Court's Analysis

The plaintiffs claimed that the physician was negligent in two respects: first, in *prescribing* an inappropriate type and dose of medication; and second, in *failing to warn* of the potential side effects that could affect driving.<sup>1</sup>

Several jurisdictions around the country have previously debated the extent of a physician's duty to third parties under various circumstances. In Wilschinsky v. Medina, the New Mexico Supreme Court narrowly ruled that a physician owes a duty to third parties injured by patients driving automobiles when the patient has just been injected with medications, such as narcotics, known to affect judgment and driving ability.<sup>2</sup> However, in Lester v. Hall, the same Court later declined to extend this duty to cover prescription medications such as lithium. The Court seriously considered the potential impact on malpractice litigation if a physician's duty was extended to the general public.<sup>3</sup>

The Hawaii Supreme Court recognized that increasing a physician's liability for negligent prescribing might dissuade physicians from prescribing "medically necessary" medications. The Court emphasized that the risk of tort liability to the individual patient already discourages negligent prescribing; therefore, a physician *does not* have a duty to third parties where the alleged negligence involves *prescribing decisions* (i.e., whether to prescribe medication at all, which medication to prescribe, and what dosage to use<sup>1</sup>). On the other hand, the Court emphasized that physicians owe a duty to warn their patients of potential adverse effects of medications. Thus, liability would attach to injuries of innocent third parties as a result of *failing to warn* of a medication's effects on driving—unless a "reasonable" person *could be expected to be aware of this risk* without the physician's warning.<sup>1</sup>

## Warning of Adverse Effects of Medication

An array of documents and resources is available to guide physicians in developing their own patient warning policies.<sup>4-6</sup> In addition, the National Transportation Safety Board (NTSB) has recently examined the role of medications in transportation accidents and proposed to create a list of approved medications for commercial vehicle drivers.<sup>7</sup> Currently, the Food and Drug Administration (FDA) issues driving precautions for numerous medications causing central nervous system depression or hypotension, as well as for other medications that commonly impair driving ability. They include the following categories:

- Centrally-acting drugs, including sedatives, antipsychotics, and antidepressants
- Antiarrhythmics or other arrhythmogenic agents
- Antihypertensives

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- Hypoglycemic agents, such as insulin and sulfonylureas
- Analgesics, especially narcotics
- Topical ophthalmic agents, especially those for treating glaucoma
- Antihistamines and cough medicines
- Other drugs known to cause drowsiness or dizziness

Physicians must recognize and explain to their patients how these medications may affect driving ability. For example, driving risks increase with higher medication doses and for people taking more than one drug simultaneously. This risk is greatest soon after initiating the drug regimen and then may normalize after several months.<sup>4</sup> Moreover, these medications may enhance alcohol's deleterious effects.<sup>5</sup> After starting therapy or changing doses, patients should exercise caution when driving until they are aware of the effects of the medication. Warning about the effect of these medications on driving ability is paramount, as is documenting the explanation.

### Warning of Medical Conditions

What is the physician's role in warning patients with *medical conditions* that may lead to hazardous driving? In *Freese v. Lemmon*, the Iowa Supreme Court held that a physician must warn a patient with a newly diagnosed seizure disorder about the risks of driving. In this case, a patient with a history of a single seizure injured a woman when he suffered a second seizure while driving. As in *McKenzie*, the third-party plaintiff filed suit, alleging, in part, that the physician negligently failed to warn his patient of the potential driving hazards related to his condition. The *Freese* court concluded that a physician may be liable to a third party under such circumstances.<sup>8</sup> This case illustrates a physician's responsibility to provide warning, not only of medication side effects, but of any health-related condition that impairs driving ability.

The Hawaii Department of Transportation<sup>9</sup> refers to guidelines developed by the American Medical Association (AMA) to assist health care providers who conduct medical examinations of drivers on behalf of licensing authorities.<sup>6</sup> While physicians must use their judgment in determining whether a medical condition affects an individual patient's ability to drive, the AMA has identified specific medical conditions which may impair driving, including:

- Decreased visual acuity, greater than 20/40
- Seizure disorder
- Unstable diabetes mellitus, including those with severe insulin-dependence or persisting ketosis
- Sleep disorders, including narcolepsy and sleep apnea
- Cardiac conditions, including rhythm disturbances, unstable angina, or post-myocardial infarction
- Dementia

While restrictions may be flexible for non-commercial vehicle drivers, they are rigid for commercial vehicle drivers, such as those transporting hazardous materials or busloads of people. The Federal Motor Carrier Safety Administration (FMCSA) has provided specific medical guidelines, including strictly disqualifying commercial vehicle drivers with insulin-dependent diabetes mellitus or those with a blood pressure greater than 181/105.<sup>10</sup> States such as Utah have used these guidelines to formulate their own recommendations.<sup>11</sup>

### Duty to Report to Licensing Authorities—Is There One?

Many motor vehicle agencies, including Hawaii's, have established a medical advisory board (MAB) to evaluate medical issues related to driving and licensure. The members of the MAB, a group of appointed physicians, advise the driving examiner with respect to medical criteria and vision standards for motor vehicle drivers.<sup>12</sup> If necessary, the examiner may require private physicians to complete a medical questionnaire regarding the patient's driving ability. The questionnaire helps the MAB determine whether the patient is fit to drive or should have driving restrictions placed. However, ultimately the driving examiner makes the final decision regarding licensing qualification.

What if, in the interim period of licensure, a patient's health condition deteriorates to a degree that hinders safe driving? Hawaii does not have a statute requiring the *reporting* of patients with conditions that may impair driving. In many states, however, physician reporting of medically impaired drivers is encouraged, while others actually mandate reporting conditions such as epilepsy.<sup>13</sup> Some states, including Texas, Utah, Florida, and Arizona, have implemented provisions to immunize health care professionals from liability for making judgments regarding patients' ability to drive safely.<sup>14-17</sup>

The AMA's Council on Ethical and Judicial Affairs recently published an opinion on reporting patients with driving impairments. First, the physical or mental impairment must "clearly relate to the ability to drive," and "the driver must pose a clear risk to public safety." Appropriate documentation is prudent and necessary, with physicians discussing the risks of driving with the patient and family. Then, depending on the patient's condition, physicians may recommend further treatment options or encourage the patient and family to decide on a restricted driving schedule. Efforts to inform patients, advise them of their options, and negotiate a plan may preempt the need to report. The AMA ethically supports reporting in good faith only under strict circumstances:<sup>18</sup>

Physicians should use their best judgment when determining when to report impairments that could limit a patient's ability to drive safely. In situations where clear evidence of substantial driving impairment implies a strong threat to patient and public safety, and where the physician's advice to discontinue driving privileges is ignored, it is desirable and ethical to notify the Department of Motor Vehicles.

The AMA urges physicians to work with their state government to create statutes that uphold the best interests of the patient and the community while protecting physicians from liability when reporting in good faith.<sup>18</sup> Hawaii currently has no such statute to guide physicians. Instead, physicians must weigh factors such as patient-confidentiality and public safety when managing a patient who may be driving-impaired.

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